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689, 692. True, the Supreme Court, in *Thompson* v. *Utah* (1898) 170 U. S. 343, held that a person accused of felony could not authorize a jury of eight, whereas in *Schick* v. *U. S., supra,* it decided, in terms, that a jury might be "waived" in petty misdemeanors. But the *Schick* case actually decided, it is submitted, only that the right to a jury trial for such offenses did not in fact exist.

The *Schick* case does, however, appear to lend some sanction to the position taken by Aldrich, J., in the principal case; for Brewer, J., speaking for the Court, cites *Com.* v. *Dailey, supra,* approvingly, and Harlan, J., stood alone in his contention that as no crime, however trivial, was summarily triable by a magistrate at common law except under Act of Parliament, the appellant, in the absence of a statute conferring the requisite jurisdiction, had not been convicted by a legally constituted tribunal. Moreover, whereas in *Hopt* v. *Utah* (1884) 110 U. S. 574 it was unanimously held that the accused had no power to waive a statutory right to be present during his entire trial, more recently, in *Queenan* v. *Oklahoma* (1902) 190 U. S. 548, a juror's disqualification, appearing in the course of the trial but waived by the accused, was declared, unanimously, not to vitiate the verdict. This apparent growing disposition against technical defenses might lead the Supreme Court to follow *Com.* v. *Dailey, supra.* But in the absence of authority that at common law, in misdeameanor cases triable by jury, a verdict could be rendered by less than twelve jurors, the principal case is logically sound. And it is even doubtful that a Federal statute authorizing consent to a reduction of the panel ought to stand if passed, in view of the position and the peremptory language of Art. III, §3, clause 2 of the Constitution: "The trial of all crimes shall be by jury." Cf. *Bank* v. *Okley* (1819) 4 Wheat. 235, 244.

Proof of Dangerous Tendency by Evidence of Prior Effect.—The dissenting opinion in a recent New York case illustrates a reactionary tendency which has already assumed considerable proportions. The majority held that evidence of a prior accident in a passageway through an elevator shaft was admissible, to indicate the dangerous character of the place. Two justices maintained that, since it was not shown that the defendant knew of the former accident, the testimony was incompetent. *Cefola* v. *Siegel-Cooper Co.* (1908) 111 N. Y. Supp. 1112.

Where such knowledge of dangerous tendency or quality is possessed by the individual charged with responsibility, evidence of the accidents whether one or many, through which this knowledge was derived, is uniformly admitted. Clearly, it gives rise to an inevitable inference of negligence. *City of Chicago* v. *Powers* (1866) 42 Ill. 169. But even where such notice and knowledge are lacking, proof of prior effect, it is submitted, is relevant. In order to investigate properly the merits of a given accident, it is not merely desirable, but material to determine the tendency, nature, and quality of the place or object involved. To determine these accurately, it is essential to apply the practical test of common experience. *Phelps* v. *R.R. Co.* (1887) 37 Minn. 487. Failure to realize the true evidentiary purpose and that negligence or due caution are, at best, merely indirect in-

ferences, has led to much of the confusion of the cases, which a neglect of two simple conditions of admissibility has not lessened.

In the first place, to make the evidence of prior effect *legally* relevant in an action where its present effect is at issue, an underlying similarity of conditions must be shown. *Aurora* v. *Brown* (1882) 12 Ill. App. 131; *Bailey* v. *Trumbull* (1863) 31 Conn. 581. In the absence of such proof, the evidence is of too indirect a character to be of practical probative value. *Sullivan* v. *D. & H. Canal Co.* (1900) 72 Vt. 353. Secondly, the more recent the evidence of injury at the given place, the more strongly does the presumption of a continued similar condition operate. Where the accident occurred at too distant a date, evidence of it has often been excluded, on the theory, seemingly, that while ordinarily it is merely the *weight* of the evidence which varies inversely as the remoteness increases, still, at a certain point the evidence itself becomes too unimportant to be legally material, *a fortiori,* competent. The conditions of modern trial by jury afford an explanation. Oftentimes these two grounds of exclusion are confused, but that there are two distinct inferences involved, is clear. Cf. *Gillrie* v. *Lockwood* (1890) 122 N. Y. 403. At what precise stage the exclusionary principles should operate is a question for the trial court to determine. (Thayer, Prel. Tr. Evid., 517: "In such cases it is a question of where lies the balance of practical advantage.") Necessarily, the question must be largely one of judicial discretion; but that, it is submitted, in no way justifies an inflexible rule of exclusion. *Bemis* v. *Temple* (1894) 162 Mass. 342, 4.

In the first American case in point, *Collins* v. *Dorchester* (Mass. 1850) 6 Cush. 396, an injury occurred on a highway through an alleged defect in a railing. The Massachusetts Supreme Court, speaking through Metcalf, J., denied that evidence that another person under like circumstances had recently suffered a similar accident was admissible. Coming from so distinguished a source, this ruling naturally influenced subsequent development, and, together with the case of *Temperance Hall Ass'n* v. *Giles* (1869) 33 N. J. L. 260, explains a long line of similar decisions. *Aldrich* v. *Pelham* (Mass. 1854) 1 Gray 510; *Parker* v. *Publishing Co.* (1879) 69 Me. 173, and cases cited. Either that the introduction of collateral events results in confusion of issues, or that the probative value is disproportionate to the incident expense of time, is the usual *ratio decidendi. Phillips* v. *Willow* (1887) 70 Wis. 6. If the two fundamental exclusionary principles, which have been indicated, are heeded, such consequences will rarely, if ever, be involved. It is far preferable to submit the proffered evidence to these preliminary tests than to adopt an invariable rule of exclusion which is not only illogical but unnecessary. The theory of *Collins* v. *Dorchester, supra,* reached its high water mark in *Martinez* v. *Planel* (1869) 36 Cal. 578. The attack on its underlying fallacies, beginning with *Darling* v. *Westmoreland* (1872) 52 N. H. 401, culminated in the New York leading case of *Quinlan v. Utica* (1877) 11 Hun 217, aff'd, 74 N. Y. 603. These cases squarely hold that in any investigation, legal or scientific, a knowledge of the nature of the place or object involved is essential and that to properly ascertain this, the test of experience must necessarily be employed. This has since been repeatedly recognized as a specific ground for admitting evidence of previous accidents, *Fordham* v. *Gouverneur* (1899) 160 N. Y.

541; *Taylorville* v. *Stafford* (1902) 196 Ill. 288, though in many rulings the identical evidence, in the light of surrounding circumstances, has been likewise held competent to indicate notice to the person charged with responsibility. *Stair* v. *Kane* (1907) 156 Fed. 100. Thus, prior accidents on a defective pavement may be admissible, not only to show that the common cause of the respective injuries possesses certain dangerous characteristics, but also to charge the municipal authorities with notice thereof. *District of Columbia* v. *Armes* (1882) 107 U. S. 519; *accord, Phelps* v. *R.R. Co., supra.* The two, however, are quite distinct.

The undeniable reactionary tendency in New York, revealed in the minority reasoning, is prevalent, also, at present, in a few other jurisdictions, and it is the more remarkable, perhaps, because of a recent liberal treatment of this evidence in Massachusetts itself. *Flaherty* v. *Powers* (1896) 167 Mass. 61; *Spaulding* v. *Lithograph etc. Co.* (1898) 171 Mass. 271. Such a reaction seems unfortunate. It might, however, be noticed that a total absence of proof of recency or of similarity of conditions seems to discredit the actual result reached by the majority.